1-11-2012

State v. Satcher Appellant's Reply Brief Dckt. 38278

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 38278
	)	
v.	)	
	)	
TIA JO SATCHER,	)	REPLY BRIEF
	)	
Defendant-Appellant.	)	
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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STATEMENT OF THE CASE

Nature of the Case

The State in this case has conceded at least two trial errors identified by Ms. Satcher in this appeal, and has failed to fully argue the substantive merits of a third. First, the State has conceded that it was error for the district court to permit the State to present the testimony of a law enforcement officer that, in his expert opinion, Ms. Satcher was lying when she denied guilt of the underlying offense. The State has also conceded that it was error for the district court to permit the introduction of evidence of a prior restitution order against Ms. Satcher as a prior felony conviction under I.R.E. 609. The State's sole contentions on appeal with regard to these errors is that the errors were harmless beyond a reasonable doubt. This Reply Brief is necessary, both to clarify the pertinent standards governing this Court's review for harmless error and to clarify that, under the facts of this case, neither errors standing alone is harmless beyond a reasonable doubt.

The State also erroneously suggests that the prosecutor's misconduct in seeking to admit the expert opinion testimony of a law enforcement officer as to Ms. Satcher's truthfulness is somehow rendered sanctionable because the district court failed to recognize that such testimony invades upon the province of the jury. This claim is directly contrary to Idaho Supreme Court precedent. Because the minimal argument provided by the State is without support in the case law, Ms. Satcher asserts that the prosecutor in this case committed misconduct. Moreover, the State has failed to argue that this misconduct is harmless. Because it is the State's burden to establish the

harmlessness of objected to prosecutorial misconduct, and because the State has waived any argument as to harmlessness in this case, prejudice must be presumed.

This Reply Brief is additionally necessary to clarify that, under the pertinent standards for cumulative error review, the aggregate effects of the trial errors in this case require reversal.

Finally, while Ms. Satcher continues to assert that the State's evidence was insufficient to support her conviction for grand theft, she will not reiterate her arguments herein, but will instead rely upon the arguments contained within the Appellant's Brief in this case.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Satcher's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUES

1. Has the State failed to establish, beyond a reasonable doubt, that the district court's error in permitting a law enforcement officer to present his "expert" opinion testimony that Ms. Satcher was lying when she denied guilt of the charged offense was harmless beyond a reasonable doubt?

2. Did the prosecutor commit misconduct when he intentionally elicited testimony from one witness regarding his opinion of Ms. Satcher's truthfulness in denying guilt of the charged offense?

3. Has the State failed to establish, beyond a reasonable doubt, that the district court's error in admitting evidence in the form of a restitution order under the auspices of I.R.E. 609 was harmless beyond a reasonable doubt?

4. Does the cumulative error doctrine require reversal in this case?

ARGUMENT

I.

The State Has Failed To Establish, Beyond A Reasonable Doubt, That The District Court's Error In Permitting A Law Enforcement Officer To Present His "Expert" Opinion Testimony That Ms. Satcher Was Lying When She Denied Guilt Of The Charged Offense Was Harmless Beyond A Reasonable Doubt

A. Introduction

The State has conceded error in the trial court's failure to sustain Ms. Satcher's objections to the prosecutor's elicitation of "expert" testimony of a law enforcement officer as to his opinion regarding Ms. Satcher's truthfulness when she denied guilt of the charged offense. As such, the sole issue for this Court regarding this claim is whether the State has established that this error is harmless beyond a reasonable doubt. Because the State has not done so, Ms. Satcher asserts that reversal of her conviction is required.

B. The State Has Failed To Establish, Beyond A Reasonable Doubt, That The District Court's Error In Permitting A Law Enforcement Officer To Present His "Expert" Opinion Testimony That Ms. Satcher Was Lying When She Denied Guilt Of The Charged Offense Was Harmless Beyond A Reasonable Doubt

As has been noted, the State has already conceded that it was error for the trial court to have permitted the prosecutor in this case to question a law enforcement officer regarding whether, in his expert opinion, Ms. Satcher was lying when she denied guilt of the charged offense. Therefore, the remaining question for this Court on this issue is whether the State has established that this error was harmless beyond a reasonable doubt. Ms. Satcher submits that the State has not done so.

The State presents three main arguments in an attempt to establish that this error was harmless. First, the State claims that, "the jury already knew or would have

surmised that Detective Kendall did not believe [Ms.] Satcher's exculpatory version of events." The State bases this claim on the fact that the detective, "was a witness against her," positing that this "would have informed any rational jury that the detective did not accept her exculpatory version of events as truthful." (Respondent's Brief, pp.9-10.)

This argument is without support in the law. It is not an implied premise, or part of the function of the presentation of testimony from any witness, that the witness harbors any particular belief as to the guilt or innocence of the defendant.

The Idaho Rules of Evidence permit two general types of evidence to be presented by witnesses – expert testimony and lay witness testimony. *See* I.R.E. 701, 702. However, the case law is clear as to both types of testimony – in neither case can a witness express an opinion as to the truthfulness of another's testimony, nor can they express an opinion as to the defendant's guilt. *See, e.g., State v. Christiansen*, 144 Idaho 463, 468-469 (2007); *State v. Perry*, 139 Idaho 520, 525 (2003). Because it is unlawful for any witness to expressly state an opinion as to the guilt or the veracity of a defendant, it would likewise be inappropriate for this Court to assume that any juror would draw any such inadmissible inference from the mere fact that a witness was called to testify by the State.

In addition, this argument ignores the fact that this testimony was not presented merely as the personal belief of Detective Kendall. Rather, the State attempted to cloak this testimony in the garb of pseudo-scientific expertise – capability that was purportedly beyond the ken of the normal juror. For example, the prosecutor during Ms. Satcher's trial asked Detective Kendall a series of questions regarding his "expertise" in reading

"verbal and non-verbal cues" of those he suspected of criminal activity. (Trial Tr., p.316, L.1 – p.323, L.15.) The officer likewise emphasized his participation in "countless" interviews, telling the jury that, as part of his training, he has watched many other interviews and been trained as to specific physical and other cues that indicate a person is lying. (Trial Tr., p.316, L.24 – p.317, L.18.)

In doing so, the prosecutor was seeking to have the jury defer to this testimony in presenting the detective as the equivalent of a human lie detector. This point was brought home through the manner in which the prosecutor framed his questions of Detective Kendall. Every time the prosecutor asked the detective regarding his opinion of Ms. Satcher's truthfulness in denying guilt, or responded to Ms. Satcher's objections to doing so, the prosecutor emphasized in the presence of the jury the detective's purported specialized expertise in making such determinations. The prosecutor's remarks on this issue included the following:

> Sir, **based on your training and experience as a detective in interrogations,** was Ms. Satcher being truthful?
>
> ...
>
> ... that's why we asked the questions leading up to what his training and experience was; **he holds an advanced certificate, he -- he does significant training in this area of interrogation, what cues, verbal and nonverbal cues he looks for**
>
> ...
>
> **Detective, you talked about some of the training and experience you have in -- in performing interrogations in the years you've been a detective. Based on that training and experience,** were you able to form an opinion as to whether Ms. Satcher was being truthful to -- with you during the state -- with the statements that she made to you during her interrogation with you?
>
> ...
>
> **... this person, Detective Kendall, qualifies as an expert regarding those cues, and nonverbal cues, and those things that he can point to in determining whether a person is being truthful with him during an interrogation.**

Trial Tr., p.320, L.5 – p.322, L.22 (emphasis added).

Each of these repeated statements regarding Detective Kendall's purported specialized abilities to detect when a suspect is lying was made in the presence of the jury. Because the prosecutor presented the officer's belief in the packaging of expert testimony, and presented Detective Kendall's qualifications for detecting truth as somehow beyond that of the average juror, there is every probability that the jurors in Ms. Satcher's case would defer to that purported expertise.

The State's second argument as to why this Court should find this error harmless is that the prejudice of the detective's testimony was cured by a general jury instruction presented at the close of evidence that indicated that the jury was entitled to make its own evaluation of the evidence. (Trial Tr., p.643, Ls.3-25.) However, this argument is unavailing for two reasons. First, this was a general evidentiary instruction that was not presented in order to provide any limitation regarding the jury's consideration of the "expert" testimony presented by Detective Kendall and was not given to the jury until after the State had fully rested its case. In fact, this same instruction empowered the jury to consider all of the evidence that the court permitted to be introduced at trial. (Trial Tr., p.643, Ls.3-5.)

Which leads to the second, and more important, reason why the jury instructions did not cure the prejudice of Detective Kendall's improper testimony at trial. The State's argument ignores that the district court expressly ruled – **in the presence of the jury** – that the detective's testimony as to Ms. Satcher's truthfulness in denying guilt was something that the jury specifically could consider in its deliberations at trial. (Trial Tr., p.322, L.23 – p.323, L.10.) In the face of a specific ruling that this improper

testimony could actually be considered by the jury at trial, the more general instruction limiting the jury's consideration to the evidence actually presented at trial would have no mitigating effect at all. The court informed the jurors that they could consider this evidence, and did nothing in its instructions that would otherwise indicate that they could not – or should not – credit the officer's "expert" opinion as to Ms. Satcher's truthfulness and guilt of the charged offense.

Finally, the State asserts that the evidence in this case was "overwhelming," and therefore the error in the admission of Detective Kendall's improper testimony was harmless. As an initial matter, the State appears to misapprehend the pertinent standard for this Court's review of harmless error. First, the State's argument focuses on whether "the evidence of [Ms.] Satcher's **untruthfulness** was overwhelming." (Respondent's Brief, p.11(emphasis added.)) However, under the test articulated by the Idaho Supreme Court in *State v. Perry*, the test is whether the State's evidence regarding the **charged offense** was both overwhelming and uncontested. *State v. Perry*, 150 Idaho 209, 222-223 (2010).

Second, the State's argument as to harmlessness flips that actual standard of this Court's review. The State, in this case, is essentially asserting that, because a juror could have still voted to convicted Ms. Satcher under the remaining evidence, the error was harmless beyond a reasonable doubt. (Respondent's Brief, pp.11-12.) However, this is not the appropriate standard of review.

In *Perry*, this Court adopted the harmless error standard from *Chapman v. California*[1] for all objected-to errors at trial. *Perry*, 150 at 222. This standard places the

[1] *Chapman v. California*, 386 U.S. 18 (1967).

burden on the State to establish that the error at trial was harmless beyond a reasonable doubt, meaning generally that "the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967). In applying this standard, however, the *Chapman* Court did not look to whether the jury, in absence of the error, could have nevertheless convicted the defendant. Rather, the *Chapman* Court directed its attention to whether a reasonable juror could have **acquitted** the defendant in absence of the error:

> ... though the case in which this occurred presented a reasonably strong 'circumstantial web of evidence' against petitioners, **it was also a case in which, absent the constitutionally forbidden comments, honest, fair-minded jurors might very well have brought in not-guilty verdicts**. Under these circumstances, it is completely impossible for us to say that the State has demonstrated, beyond a reasonable doubt, that the prosecutor's comments and the trial judge's instruction did not contribute to petitioner's convictions.

Id. at 25.

The State in this case cannot establish that no rational juror would have acquitted Ms. Satcher. This is because the State's evidence in this case was neither overwhelming, nor uncontested, as to her charged offense of grand theft. As was noted in the Appellant's Brief, the only factual account of what transpired after Ms. Ostolasa-Mendiola misplaced her purse came from Ms. Satcher herself – and her version of events was entirely consistent with the other evidence presented by the State at trial. (*See* Appellant's Brief, p.26.) The State had no direct evidence that Ms. Satcher was aware of Mr. Miner's use of Ms. Ostolasa-Mendiola's credit card, and no evidence that she harbored any intent to appropriate the credit card for his use. The sum and substance of the State's whole case was entirely circumstantial. Under these circumstances, particularly when the jury's evaluation of Ms. Satcher's credibility in

denying guilt was central to the jury's determination of guilt, this error cannot be said to have been harmless beyond a reasonable doubt.

II.

The Prosecutor Committed Misconduct When He Intentionally Elicited Testimony From One Witness Regarding His Opinion Of Ms. Satcher's Truthfulness In Denying Guilt Of The Charged Offense

A. Introduction

The State's assertion that, because the district court erroneously admitted improper opinion testimony from Detective Kendall, there could not also be a finding of prosecutorial misconduct based upon the intentional elicitation of that testimony is directly contrary to Idaho Supreme Court precedent, and therefore is without merit. Additionally, the State has failed to argue that this misconduct was not prejudicial. In failing to do so, the State has waived any argument regarding the prejudice flowing from the misconduct in this case. In light of this, Ms. Satcher asserts that reversal of her conviction of grand theft is required.

B. The Prosecutor Committed Misconduct When He Intentionally Elicited Testimony From One Witness Regarding His Opinion Of Ms. Satcher's Truthfulness In Denying Guilt Of The Charged Offense

The State's sole argument regarding Ms. Satcher's assertion of prosecutorial misconduct is contained entirely within a footnote in the Respondent's Brief. (Respondent's Brief, p.7 n.1.) In this footnote, the State asserts that, because the trial court erroneously admitted improper opinion testimony from Detective Kendall, there was no misconduct. This argument misconstrues the Idaho Supreme Court's Opinion in *Christiansen*, and ignores the Court's Opinion in *State v. Ellington* regarding this issue.

From the outset, the State's argument is directly contrary to the recent Idaho Supreme Court Opinion in *State v. Ellington*, 151 Idaho 53, 67 (2011). In *Ellington*, the defendant challenged, *inter alia*, the district court's erroneous admission of a police officer's expert opinion testimony that the defendant acted intentionally when he struck the alleged victim with his truck. *Id.* While the *Ellington* Court found that the admission of this evidence by the district court was error, the Court further noted that it would have also found the presentation of this testimony to **also** be prosecutorial misconduct:

> Trooper Daly gratuitously and unnecessarily injected his clearly inadmissible opinion that Mr. Ellington acted intentionally. Not only was his answer an inadmissible intrusion into the jury's domain of determining the defendant's state of mind, it was also completely unsolicited and wholly unnecessary. As an officer of the State, Trooper Daly's gratuitous and prejudicial response is imputed to the State, whether or not the State intended to elicit that response. **Had Mr. Ellington raised this issue as another instance of prosecutorial misconduct on appeal, we would have found, once again, that the State's conduct was improper.**

Ellington, 151 Idaho at 67.

As was the case in *Ellington*, it is uncontested in this case that the district court in this case erroneously admitted improper opinion testimony from a law enforcement officer that was clearly inadmissible because it invaded upon the province of the jury. But the *Ellington* Court did not find that the district court's admission of this evidence precluded a finding of prosecutorial misconduct based upon the elicitation or presentation of such testimony. The Court found the opposite – had the issue been raised as prosecutorial misconduct in addition to challenging the testimony as evidentiary error, the *Ellington* Court would have found the prosecutor to have committed misconduct regarding the challenged testimony as well.

In addition, the State's limited argument on this issue ignores that the prosecutor has an independent duty to the defendant with regard to his or her right to a fair trial. In the words of the *Christiansen* Court regarding this issue:

> We long ago held, "It is the duty of the prosecutor to see that a defendant has a fair trial, **and that nothing but competent evidence is submitted to the jury. They should not "exert their skill and ingenuity to see how far they can trespass upon the verge of error, [because] generally in so doing they transgress upon the rights of the accused."** Prosecutorial misconduct includes asking questions where the answer is inadmissible, but the jury can infer what the answer would have been simply from the question asked.

Christiansen, 144 Idaho at 469 (internal citations omitted) (emphasis added).

In the State's footnote on this claim of error, the State suggests that the *Christiansen* Opinion limited a finding of misconduct only to cases where the prosecutor asks questions, "*as a way of circumventing either the rules of evidence or judicial rulings*." (Respondent's Brief, p.7 n.1 (emphasis in the original.)) What is clear, however, from the above-quoted passage from *Christiansen* is that even attempting to skirt upon the bounds of inadmissible testimony is improper, regardless of whether the trial court erroneously sanctions the prosecutor's misconduct through an improper ruling. *See Christiansen*, 144 Idaho at 469. It is undisputed that the officer's testimony regarding his opinion of Ms. Satcher's truthfulness in denying guilt was plainly improper. (*See* Respondent's Brief, p.7.) Under well-established case law, the solicitation of this evidence by the prosecutor was misconduct as well.

At base, the State's argument regarding misconduct appears to confuse evidence that was erroneously **admitted** by the trial court with evidence that is actually **admissible** under the Rules of Evidence. Because an erroneous ruling admitting

evidence that is plainly improper does not preclude a finding of misconduct, the State's assertion that the prosecutor did not commit misconduct is without merit.

C. The State Has Failed To Make Any Argument On Appeal That The Prosecutorial Misconduct In This Case Was Harmless, Thereby Waiving Any Such Argument On Appeal, And Prejudice Must Therefore Be Presumed By This Court

It is undisputed that, because Ms. Satcher objected repeatedly to the prosecutor's improper questioning of Detective Kendall as to his opinion of Ms. Satcher's guilt and truthfulness, the State bears the burden on appeal to establish that this misconduct is harmless. *See Perry*, 150 Idaho at 228. However, case law from the Idaho Supreme Court demonstrates that the failure of the State to argue harmlessness waives any claim of harmless error on appeal and, in such cases, prejudice is presumed. *See State v. Ruiz*, 150 Idaho 469, 471 (2010).

In *Ruiz*, the Court found that it was error for the district court to exclude otherwise relevant evidence without conducting the required balancing test contained within I.R.E. 403. *Id.* After finding error, the *Ruiz* Court noted that, "The State has not argued that the error was harmless," and thereafter vacated the defendant's judgment of conviction without any further consideration as to whether the error was harmless. *Id.*

The same circumstances with regard to the failure of the State to make any argument regarding prejudice are present in this case. The State's footnote addressing the claim of prosecutorial misconduct in this case contains no argument at all regarding prejudice. (Respondent's Brief, p.7 n.1.) As such, the State has waived any such claim

and this Court should reverse Ms. Satcher's conviction for grand theft based upon the prosecutorial misconduct that occurred in this case.[2]

III.

The State Has Failed To Establish, Beyond A Reasonable Doubt, That The District Court's Error In Admitting Evidence In The Form Of A Restitution Order Under The Auspices Of I.R.E. 609 Was Harmless Beyond A Reasonable Doubt

A. Introduction

The State has conceded error in the district court's admission of evidence of a prior restitution order jointly entered between Ms. Satcher and Robert Minor as a prior felony conviction under I.R.E. 609. The sole contention raised by the State on appeal is that this error was harmless beyond a reasonable doubt. Ms. Satcher asserts that the State has failed to establish harmless error.

B. The State Has Failed To Establish, Beyond A Reasonable Doubt, That The District Court's Error In Admitting Evidence In The Form Of A Restitution Order Under The Auspices Of I.R.E. 609 Was Harmless Beyond A Reasonable Doubt

The State has conceded that the district court's admission of evidence indicating a joint restitution order as a result of a criminal conviction for a purpose other than Ms. Satcher's general credibility under I.R.E. 609 was error. (Respondent's Brief, p.14.) While the State claims that this error was harmless beyond a reasonable doubt, Ms. Satcher asserts that the State's arguments in this regard are without merit.

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[2] Ms. Satcher further asserts that the State could not have established, beyond a reasonable doubt, that the misconduct in this case was harmless even if the State had elected to argue this issue for the reasons set forth more fully in her Appellant's Brief. (*See* Appellant's Brief, pp.26, 31.)

The State asserts that, because Ms. Satcher did not contest the fact that she had a prior felony conviction under I.R.E. 609, this somehow renders admission of evidence of a joint restitution order entered against both her and Mr. Minor non-prejudicial. (Respondent's Brief, p.15.) This argument ignores two salient considerations.

First, admission of a prior felony conviction under I.R.E. 609 is limited to issues of the general credibility of a witness, and the specific circumstances underpinning that conviction are expressly prohibited from being injected into the evidence under this rule. *See* I.R.E. 609(a). In putting into evidence the restitution order resulting from this conviction, the district court not only violated the basic terms of I.R.E. 609, but placed into evidence the circumstances underpinning this conviction to the extent that it revealed to the jury that Ms. Satcher was found to have on a prior occasion engaged in unidentified criminal activity with Mr. Minor for which she faced criminal liability. This tended to demonstrate nothing more to the jurors than that Ms. Satcher had a propensity to engage in criminal activity with Mr. Minor, as she was alleged to have done in this case, and this is sufficient prejudice to render the admission of the restitution order reversible. *See also State v. Fernandez*, 124 Idaho 381, 383-384 (1993).

Second, the State's argument that, because this evidence was irrelevant to the charges levied against Ms. Satcher, it could not have been prejudicial is contrary to the case law. Prior cases recognize that the presentation of irrelevant evidence can, and is, in some cases highly prejudicial to the defendant. For example, the Court in *Ellington* found that the prosecutor's improper questioning of a witness was designed to illicit testimony that was **both** irrelevant to the charges that the defendant was facing and

simultaneously prejudicial to the defendant. *Ellington*, 151 Idaho at 61 (finding that the improperly admitted testimony, "was undoubtedly both gratuitous and prejudicial to the defendant"). Likewise, the Court in *Fernandez* held that the other-acts evidence presented at trial was not relevant to the charged offense, but that it carried with it such a potential for prejudice that the admission of the evidence was reversible error. *Fernandez*, 124 Idaho at 383-384. Given this, the State's suggestion that admission of evidence that is irrelevant to the charged offense is harmless for the reason of its irrelevant nature is not well-founded.

IV.

The Cumulative Error Doctrine Requires Reversal In This Case

Finally, the State concedes in this case that more than one error was present in Ms. Satcher's case, and therefore the cumulative error doctrine is applicable to this Court's review. However, the State's arguments as to why the aggregate effects of the errors in this case would not require reversal are without support in the case law.

The State suggests to this Court that it will only review the aggregate effect of trial errors where, "the errors would result in prejudice that would have a cumulative effect." (Respondent's Brief, p.16.) To the extent that the State is arguing that the errors must have to be of the same type or nature in order for this Court to review the aggregate effect of the error, this claim is without any substantiation in the case law, nor is any provided by the State. *See State v. Zichko*, 129 Idaho 259, 265 (1996) (a party waives an issue on appeal if either argument or authority is lacking).

According to those cases setting forth the standard for cumulative error, the reviewing court looks to the aggregate effects of multiple errors, regardless of whether

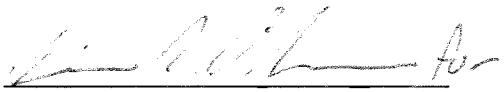
the trial errors were of the same general type. *See, e.g., State v. Field*, 144 Idaho 559, 572-573 (2007). For example, in *Field*, the Court found error in the trial court's joinder of two offenses, admission of improper hearsay, admission of prior bad acts evidence, and further found prosecutorial misconduct. *Id.* at 565-572. These were disparate errors that were not all logically interconnected. Yet, the *Fielding* Court found that the aggregate prejudicial effect of these errors warranted reversal under the cumulative error doctrine, regardless of whether these errors were interrelated. *Id.* at 572-573. The State's contrary suggestion that this Court must find some interconnectedness between the aggregated errors is without support in the case law.

In addition, Ms. Satcher reiterates her prior assertion that these errors **are** related in that all of the trial errors that occurred in her case had direct bearing on the fairness of the proceedings. (*See* Appellant's Brief, pp.38-39.) This is the sole interrelation required in order for this Court to reverse under the cumulative error doctrine. While Ms. Satcher continues to assert that each of the errors in her case warrant reversal standing alone, she further asserts that, under the cumulative error doctrine, reversal is required.

CONCLUSION

Ms. Satcher respectfully requests that this Court reverse her conviction for grand theft with prejudice in light of the fact that there was insufficient evidence to support this charge. In the alternative, Ms. Satcher respectfully requests that this Court reverse her judgment of conviction and sentence for grand theft and remand this case for further proceedings.

DATED this 11th day of January, 2012.



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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 11th day of January, 2012, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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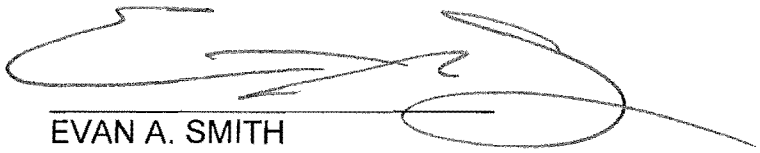

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